Supreme Court, U.S.
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No. 87-1462

In The
Supreme Court of the United States
October Term, 1987

—o—

TERRY ROGERS,

Appellant,

vs.

CITY OF CHEYENNE,

Appellee.

—o—

ON APPEAL FROM THE SUPREME COURT OF WYOMING

—o—

REPLY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

—o—

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REPLY TO APPELLEE'S MOTION TO DISMISS

Pursuant to Rule 16.5 appellant hereby replies to appellee's Motion to Dismiss and requests that said motion be denied.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Additional relevant constitutional and statutory provisions, not previously set forth by the parties, are herein set forth:

Article IV, Section 1 of the United States Constitution provides, in pertinent part, as follows:

> Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;

28 U.S.C. § 1257(2) provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 1738 provides, in pertinent part, as follows:

> Such Acts, records and judicial proceedings or copies thereof, * * * shall have the same full faith

> and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable to the District of Columbia shall be considered to be a statute of the District of Columbia.

———o———

SUMMARY OF ARGUMENT

1. This case presents a substantial federal question regarding the validity of airport height limitation ordinances under the "Taking Clause."

2. The doctrine of Res Judicata does not apply.

———o———

ARGUMENT I

THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION REGARDING THE VALIDITY OF AIRPORT HEIGHT LIMITATION ORDINANCES UNDER THE "TAKING CLAUSE"

This case concerns whether or not an airport height limitation ordinance constitutes a taking when it gives to the public a permanent right to fly through the enveloping airspace above a landowner's home, at an altitude of 25 feet, causing actual damage in the amount of $2,064. Appellee, as well as the lower court, relies exclusively on the balancing tests set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), and the public benefits test found in *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) to support the proposition that the Wyoming Court in this case properly upheld such a height restriction ordinance as not being a "taking."

Sole reliance upon those cases ignores another very important principle found in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982) which held that a minor but permanent physical occupation of a landowner's property, authorized by state law, constituted a "taking" under the Fifth and Fourteenth Amendments without regard to whether the action achieves an important public benefit or has only minimal impact on the owner. *Loretto, supra*, p. 426.

Justice Marshall, writing for the Court in *Loretto*, said:

> Our cases establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the governmental action" not only is an important factor in resolving whether the action works a taking *but also is determinative.* (Emphasis Supplied). *Loretto, supra,* p. 426.

This principle was recently reiterated by Justice Scalia in *Nollan v. California Coastal Commission,* 483 U.S. —, 97 L.Ed.2d 677, 107 S.Ct. — (1987) when the court found that a government could not, without compensation, require a public easement across private land as a condition to the granting of a building permit. *Nollan, supra,* 97 L.Ed.2d p. 686.

The evidence in this case showed that compliance with the ordinance would result in an actual economic loss to the landowner in the amount of $2,964.00 *and* would grant the public a permanent right to fly through the enveloping airspace above appellant's home at an altitude of 25 feet. Thus, the uncontroverted evidence showed that the appellant-landowner would suffer both economic impact *and* physical invasion and occupation of his property.

In *United States v. Causby,* 328 U.S. 246, 66 S.Ct. 1062, 9 L.Ed. 1206 (1946) and *Griggs v. County of Allegheny, Pennsylvania,* 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962) this court held that low flying aircraft, which interfere with the existing uses of the land beneath, caused a "taking" to occur. In those cases there was no ordinance or regulation requiring the landowner, to his damage, to maintain his property to permit such low flight—yet, a "taking" was found simply by virtue of governmentally authorized low flight by the public.

The question in this case, however, is whether straight forward state action in the form of a zoning ordinance, designed to create a clear approach to an airport, (partially to satisfy federal grant conditions pursuant to the National Airport Plan, 49 U.S.C. 1718(a)(3) and (4)), is a "taking" when the evidence shows that the effect of the ordinance will be to permit aircraft to physically occupy reasonably useable enveloping airspace and cause actual economic damage. The *Causby* and *Griggs* decisions, *supra*, holding that low flying aircraft can cause a taking, together with the later decisions of *Loretto* and *Nollan*, holding that state action allowing permanent occupation and invasion by the public of private property to be a "taking," lead one to believe that a "taking" should be found in the circumstances of this case.

The same question was previously before this court in *Jankovich v. Indiana Toll Road*, 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965), prior to such decisions as *Loretto* and *Nollan*. However, since the Court in *Jankovich* eventually declined to rule on the "taking" issue, the lack of a definitive holding regarding airport height limitation ordinances has resulted, apparently, in the Wyoming Court inappropriately applying the balancing tests of *Penn Central Transportation Co.* to this case—despite uncontroverted evidence of physical occupation *and* economic impact.

To avoid a clear conflict between the holdings of this court and the Wyoming Supreme Court and to avoid confusion regarding the "determinative" factor of actual physical occupation, probable jurisdiction should be noted.

ARGUMENT II

THE DOCTRINE OF RES JUDICATA DOES NOT APPLY

Contrary to appellee's assertion, res judicata, comity and federalism are not issues in this case as they were in *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). *Allen* involved an action in Federal Court under 42 U.S.C. § 1983 in which constitutional issues had previously been decided in state court. Thus, the Full Faith and Credit Clause (U.S. Const. art IV, § 1) and 28 U.S.C. § 1738 were applied.

This case is entirely different than the *Allen* case. This appeal is a "direct appeal" brought to this court pursuant to 28 U.S.C. § 1257(2) from a state court decision wherein a state law has been measured against the United States Constitution and found to be valid.

The state court below, though discussing Wyoming law on res judicata, declined to apply the doctrine and proceeded to *reaffirm* its prior holding in *Cheyenne Airport Board v. Rogers*, 707 P.2d 717 (Wyo.1985). *Rogers v. City of Cheyenne*, 747 P.2d 1137, 1189 (Wyo.1987).

Res judicata and its preclusive effect must be determined by state law. *Migra v. Warren City School District Board*, 465 U.S. 75, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984). Since res judicata was discussed, but not applied, by the Wyoming Court, the issues of issue or claim preclusion are not involved here.

CONCLUSION

This court should deny Appellee's Motion to Dismiss, probable jurisdiction should be noted and the lower court summarily reversed.

Respectfully submitted,

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